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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 787

J. R. HOLMAN, JACK M. JAMES, LAVONNA JAMES, ANDREW J. THICKSTUN, and ALTA MAE THICKSTUN,
Petitioners,

vs.

LILLIE BUTLER and ERNEST W. BUTLER, Executrix and Executor, respectively, of the Last Will and Testament of AARON BURR BUTLER, deceased, G. M. RUSSELL, R. W. RUSSELL, and E. F. CHAMBERS,
Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Introduction

The brief of respondents in opposition to the petition for writ of certiorari follows the pattern set by respondents in the trial Court, and adhered to strictly throughout these appeal proceedings, by charging, again and repeatedly, that the claim of petitioners that the original Government survey was changed through "reversal" of the bearing trees described in the Benson field notes is false and misrepresents the trial Court record. This claim is amply

supported by record references (Rep. Tr. pp. 527, 555, and 647—See petition pp. 35 and 36), and it should be a simple matter for this Court to determine where the "falsity" lies in this cause.

Respondents seemingly have adopted the precept espoused by a certain modern school of thought which holds that, if a false premise is enunciated often enough, it will ultimately be believed. Unfortunately, thus far, the Courts considering the issues in this cause have fallen victim to this strategy in ruling, in effect, that reversal of the two bearing trees described in the Benson field notes does not constitute such a change in an official United States Government survey as is barred by law. This is the principal issue in this cause, and it is rendered difficult to determine by the great mass of confusing matter not related thereto injected into the record, and even in the briefs filed in this cause, by respondents. It is hoped that this Honorable Court will not be similarly bemused in its consideration of this cause.

Respondents Reject Own Experts

Petitioners have heretofore cited at length in their petition the unanimous testimony of all surveyor witnesses who testified in this cause, including respondents' surveyor witnesses, Ross and Gentry, that the 24-inch scribed forked bearing tree discovered by surveyor witness Hardgrove was the Southwest bearing tree described in the official Benson field notes. Obviously, respondents cannot prevail unless they reject this evidence of their own experts, since it would dictate locating the section corner in question in accordance with said field notes and *Northeast* of said scribed bearing tree, not *Southeast,* as respondents would have it, in order to have the South line of the section run south of the mine, thus laying the basis for a large

judgment. The net effect of the reversal of the field notes, as heretofore noted, was to move the Southwest corner of Section 34 a distance of 543.65 feet South of its true location, as established by the United States Government survey.

Thus, to contradict or "impeach" the testimony of their own experts, respondents rely on the testimony of witness Emmert to "clear up" the sworn testimony of surveyor witnesses Ross and Gentry (page 14, their brief in opposition to certiorari). Respondents do not deny that Ross and Gentry testified exactly as they have been quoted, verbatim, by petitioners, but it is intimated that Ross and Gentry, surveyors with many years of experience in identifying bearing trees and other monuments, received such an "education" from the testimony of Emmert, a non-surveyor, that their testimony should be disregarded. Ross and Gentry have never changed their original testimony, and it stands unchanged in the record as given.

As a matter of fact, witness Emmert never positively stated that the pieces of burnt wood, located by witness Ross Southwest of the section corner created through reversal of the Benson field notes, came from a tree "20 to 24 inches in diameter at breast height", as is inferred on page 14 of respondents' brief. Emmert was most uncertain as to the actual size of the tree.

As to the piece of burnt wood taken from this purported bearing tree (Plaintiffs' Exhibit 28), Emmert testified under examination by counsel for respondents (Rep. Tr. p. 837):

> "Yes. Well it is approximately nine inches in diameter, what remains. I would say it certainly was somewhat bigger than that. Perhaps only a few inches.

"Q. About how much bigger? Could you estimate that?

"A. That is pretty hard. *I could only guess.*" (Emphasis added.)

As to what portion of the tree said piece of burnt wood was from, Emmert testified (Rep. Tr. p. 838):

"A. Well, I have no opinion as to how high or how low up the tree that would have come from, just from looking at it.

"Q. Is it possible to make such a determination so far as from your knowledge and experience you know?

"A. *I don't think so.*" (Emphasis added.)

In connection with the same purported bearing tree, counsel for respondents further interrogated witness Emmert (Rep. Tr. p. 839):

"Q. Which would make the tree at breast height approximately twenty inches, in your opinion, in diameter?

"A. That would be assuming that this were a tree with a single bowl and had something like normal taper. *Perhaps* the tree was forked and then the stump of the tree might be almost any diameter, though it could not be larger of course than the hole in the ground. But if it were forked down low why it might be very difficult even if you could see the tree to say what size it is. *It is pretty hard to measure a forked tree under any circumstances.*

"Q. From your observation of the root system of that tree and what you found there, do you have an opinion as to the diameter of the tree at breast height?

"A. Well, the measurement I made was 31 inches one way across the root socket. Now the tree would taper from that root socket, it would taper quite a

bit to ordinary stump height. It would *probably* taper a few inches more to breast height. *So it is pretty hard to estimate how big it was.* It certainly was less than 30 inches. *Perhaps* in the neighborhood of 20 to 24 inches. *It is pretty hard to estimate.*" (Emphasis added.)

Obviously the much-heralded Emmert testimony, intended by respondents to "cancel out" and wholly negate the positive testimony of their own expert surveyors as to the positive identification of the true Southwest bearing tree to Section 34, as set forth in the Benson field notes, is based purely upon supposition, guess and conjecture.

Contradictory Evidence Proves Nothing

Respondents cannot deny that the burden of proof was upon them at the trial of this cause, and that any judgment rendered as a result of such trial must be based upon *consistent* and *unconflicting* evidence adduced by them thereat bearing upon the issues. As hereinabove noted, respondents rely upon the testimony of witness Emmert to cancel out, negate, contradict and impeach the sworn testimony of their own surveyor experts, Ross and Gentry. In effect, the Court is asked to ignore the circumstances testified to by Ross and Gentry, and accept the testimony which it is claimed was given by Emmert.

That a party with the burden of proof who introduces evidence consistent with two states of fact actually proves neither is so fundamental as hardly to require citation of any authority. However, the case of *Grand Trunk Western Ry. Co.* v. *Holstein,* 67 F. 2d 780, is of interest in this connection. That case was a jury case, but the law set forth therein would apply with equal force to the case at bar.

The opinion contains the following at page 782:

> "If the plaintiff presents evidence of and relies upon one set of circumstances, and the defendant presents evidence of and relies upon another, there is clearly a conflict of evidence to be submitted to the jury. But if the evidence of both sets of circumstances is offered by the plaintiff, then we have in substance a situation identical with the one where several inferences may logically be drawn from the same set of circumstances. Under these conditions the jury should not be permitted to guess or speculate which set of circumstances it will accept. This principle has been well expressed by Mr. Chief Justice Taft, when Circuit Judge, in the following sentence: *'When a party with the burden on him introduces evidence consistent with two different states of fact, he proves neither.' Louisville & Nashville R. Co.* v. *East Tennessee, V. & G. R. Co.*, 60 F. 993, 999 (C. C. A. 6). Compare, also, *Ewing* v. *Goode*, 78 F. 442, 444 (C. C.); *New York C. R. Co.* v. *Ambrose*, 280 U. S. 486, 490, 50 S. Ct. 198, 74 L. Ed. 562; *Stevens* v. *The White City*, 285 U. S. 195, 203, 204, 52 S. Ct. 347, 76 L. Ed. 699." (Emphasis added.)

Respondents have proved nothing in the case at bar through contradiction and "impeachment" of their own experts, and having thus failed, they have no standing in this Court to assert the propriety of the unjust judgment entered in this cause, which petitioners pray, through the granting of certiorari herein, may ultimately be rendered for naught.

Federal Question Involved

Petitioners respectfully reiterate that a Federal question is involved in this cause and that they are entitled to have this Court protect them against an erroneous judgment based entirely upon a violation of the law, as laid down in its decisions. (See petition, pp. 25 to 31, inclusive.)

Wide Jurisdiction of This Court

Respondents take refuge in the assertion that the trial Court determined the issues of fact in this cause and that such determination cannot be inquired into by this Court through a writ of certiorari. But they overlook the fact that this Court has such wide discretion that it may properly search out anything in the record, if necessary, to see that justice between the parties is attained.

In this connection, the following from the opinion in *United States* v. *Ansonia Brass and Copper Company*, 218 U.S. 452, is of interest (Page 462):

> "We think that from this statement of the claims made in the court below on behalf of the United States assertions were made of rights and immunities which were the creation of Federal authority, and the denial thereof by the judgment of the state court brings the case within the provisions of §709 of the Revised Statutes of the United States. It is not necessary to lay the foundation for jurisdiction that the claims of Federal rights asserted should be well founded; it is enough if they are substantial claims of Federal rights within the statute, and such as were duly asserted and directly or necessarily denied in the judgment and decision of the state court."

In the case of *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux*, 279 U.S. 737, involving a suit in a State Court in which a fraternal order of white

members only sought an injunction against a similar order of Negro members only, to restrain the latter from further use of a name, constitution, etc., like those adopted earlier and in use by the former, the Court stated the following (Page 744):

> "The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this Court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. *Creswill* v. *Knights of Pythias,* 225 U.S. 246, 258, 261; *Ward* v. *Love County,* 253 U.S. 17, 22; *Davis* v. *Wechsler,* 263 U.S. 22, 24; *Railroad Commission* v. *Eastern Texas R.R. Co.,* 264 U.S. 79, 86; *New York Central R.R. Co.* v. *New York & Pennsylvania Company,* 271 U.S. 124, 126."

The opinion in the case of *Pierre* v. *Louisiana,* 306 U.S. 354, by Mr. Justice Black, contains the following, at page 358:

> "But the State insists, and the Louisiana Supreme Court held (the Chief Justice dissenting), that this evidence failed to establish that members of the negro race were excluded from the Grand Jury venire on account of race, and that the trial court's finding of discrimination was erroneous. Our decision and judgment must therefore turn upon these disputed questions of fact. In our consideration of the facts the conclusions reached by the Supreme Court of Louisiana are entitled to great respect. Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal

protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests."

The opinion by Mr. Justice Douglas in *United States* v. *Pink*, 315 U.S. 203, contains the following, at page 217:

> "This Court will review or independently determine all questions on which a federal right is necessarily dependent. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 462-463, 471; *Ancient Egyptian Order* v. *Michaux*, 279 U.S. 737, 744-745; *Broad River Power Co.* v. *South Carolina*, 281 U.S. 537, 540; *Pierre* v. *Louisiana*, 306 U.S. 354, 358."

The following from the opinion of the late Chief Justice Stone in *Sola Electric Company* v. *Jefferson Electric Company*, 317 U.S. 173, is also of interest as defining the scope of this Court's jurisdiction (Page 176):

> "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Awotin* v. *Atlas Exchange Bank*, 295 U.S. 209; *Deitrick* v. *Greaney*, 309 U.S. 190, 200-01."

And also the following from Mr. Justice Black's opinion in *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U.S. 239, at page 245:

> "If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would

actually deny, federal rights which Congress, by providing alterenative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under § 237 (b) of the Judicial Code, 28 U.S.C. § 344 (b)."

The Benson Field Notes Govern Line

Contrary to what is stated in respondents' brief, garnished with record references purportedly in support thereof, as to topographical or other features which allegedly support the erroneous line adopted by the trial Court, it is a fact that petitioners followed the official Benson field notes to the letter, while respondents, on the other hand, rejected those portions that could not be made to fit their new section line.

As previously noted in the petition, at page 557 of the Reporter's Transcript, witness Ross testified that "there are numerous errors in those notes" (that is, Benson's field notes), "the calls do not fit in many cases," referring to the line erroneously established by the trial Court, just a short distance south of the line Ross first established.

The testimony of surveyor Hardgrove and cadastral engineer Dupree R. Averill demonstrates conclusively that the Hardgrove line rejected by the trial Court coincides remarkably with the line established by the Benson field notes. This appears concisely in the Reporter's Transcript at page 1001, *et seq.*

It is not surprising that witnesses Ross and Gentry, in running a line commencing 543.65 feet South of the true location of the Section corner, experienced difficulty in making the calls of Benson's field notes fit the terrain over which they traveled.

Bearing Tree a Monument

As noted in the petition, monuments prevail over courses, distances, and other methods of following the footsteps of the original surveyor, and, once such monument has been located, the surveyor must ascertain the true boundary with reference to it. A bearing tree is, of course, a monument. In this connection, *Black's Law Dictionary,* Fourth Edition, contains the following at page 1159:

> "In real-property law and surveying, monuments are visible marks or indications left on natural or other objects indicating the lines and boundaries of a survey. In this sense the term includes not only posts, pillars, stone markers, cairns, and the like, but also fixed natural objects, *blazed trees,* and even a watercourse." (Citing authorities) (Emphasis added.)

Thus, the scribed, forked, 24-inch bearing tree discovered by witness Hardgrove, which all surveyor witnesses testified was the Southwest bearing tree to Section 34 described in the official United States Government field notes, was a "monument" positively locating said section corner

Northeast thereof. Despite all the specious argument of respondents' counsel, vehement protests that "nothing was changed" (see pages 2, 6, and 8 of respondents' brief in opposition) and "agreement" with the principles of law cited by petitioners (see pages 2, 7, and 10 of respondents' brief), the fact remains that the section corner relied upon by respondents was established by conversion of that bearing tree into the *Northwest* bearing tree, *reversing* the official field notes, thus moving the section corner 543.85 feet south of its true location.

Petitioners repeat and reiterate that the section corner in question *must*, under the decisions of this Court, be established as described in the official field notes, and once so established, a straight line running from that section corner East to the Southeast corner of Section 34 (the location of which is not in dispute) establishes the South boundary of that Section and the South line of the Butler property. *It is undisputed in this cause that a line so established would run North of the mine, eliminating any basis whatsoever for damages against petitioners.*

Conclusion

Respondents, understandably, take great comfort in a statement attributed to Mr. Chief Justice Warren, quoted on page 27 of their brief in opposition to writ of certiorari. On the date noted, the record in this cause had not yet been forwarded to this Court and was, of course, not available for examination by Mr. Chief Justice Warren. Petitioners respectfully submit that such an examination would be a necessity to justify the statement and that such an examination would support petitioners' contention that a Federal question is involved in this cause.

Petitioners pray that a writ of certiorari to the District Court of Appeals of the State of California for the Fourth District be granted by this Honorable Court, to the end that the erroneous judgments of the lower Courts may be reviewed, reversed, set aside, and rendered for naught, thus, at long last, according to petitioners that justice which is long overdue.

Dated March 29, 1957.

Respectfully submitted,

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